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Supreme Court, U.S.
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No. ———

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

JANET B. STONE, *et al.*,
Petitioners,

v.

NORTH CAROLINA DEPARTMENT OF LABOR and
NORTH CAROLINA DEPARTMENT OF LABOR,
OCCUPATIONAL SAFETY AND HEALTH DIVISION,
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of North Carolina

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Supreme Court of North Carolina violate the Federal OSHA Act when it concluded that the State of North Carolina could not be held liable for negligently enforcing its OSHA program on the ground that its OSHA enforcement authorities owed no duties to individual workers injured by their negligence?

LISTING OF PARTIES

Petitioners:

JANET B. STONE; ANNIE B. LOCKLEAR; MARY BARBARA WASHINGTON; CARRIE M. GALLOPS and WILLIAM E. PEELE, Jr., Co-Administrators of the Estate of ROSE GIBSON PEELE; JIMMY BROADY, Administrator of the Estate of MINNIE THOMSPON; LILLIE B. DAVIS; JOHNNY DAWKINS; SHARON E. TOWNSEND; GEORGIA ANN QUICK; RONALD WAYNE POOL; ALFORENCE ANDERSON, Administrator of the Estate of PEGGY JEAN ANDERSON; DAVID MACK ALBRIGHT, Administrator of the Estate of DAVID MICHAEL ALBRIGHT; FRED ERNEST BARRINGTON, SR. and NELSON BARRINGTON, Co-Administrators of the Estate of JOSEPHINE BARRINGTON; PEARLIE GAGNON, Administratrix of the Estate of JOHN R. GAGNON; MATTIE FAIRLEY; MARTHA WATERS; EVELYN WALL; KENNETH WHITE; CONESTER WILLIAMS; JOHN SANDERS; LARRY BELLAMY, Administrator of the Estate of ELIZABETH ANN BELLAMY; SARAH WILLIAMS; NELSON BARRINGTON and LINDA OWENS, Co-Administrators of the Estate of FRED BARRINGTON, JR.; ADA BLANCHARD, AUDREY SUE SCOTT; LETHA TERRY; ELAINE GRIFFIN; KIM MANGUS; SYLVIA MARTIN; GLORIA MALACHI; ALBERTA McRAE; SANDRA McPHAUL; EVANDER LYNCH, Administrator of the Estate of JANICE LYNCH; BERNETTA ODOM; THOMAS OATES, III; KATIE NICHOLSON; PAMELA MOORE; PRISCILLA MURPHY; SALLY MURPHY; NORA BUSH; THOMAS COBLE; BRENDA CHAMBERS, Administratrix of the Estate of ROSIE ANN CHAMBERS; BERNARD CAMPBELL; ROSE CHAPPELL; MARTHA NELSON, Administratrix of the Estate of MARTHA RATLIFF; DEBORAH PITTMAN;

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Respondents:

NORTH CAROLINA DEPARTMENT OF LABOR and NORTH CAROLINA DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH DIVISION

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PETITION FOR A WRIT OF CERTIORARI

Janet B. Stone, and each of the other plaintiffs named on the caption hereof, respectfully petition this Court for a writ of certiorari to the Supreme Court of North Carolina.

OPINIONS BELOW

The Supreme Court of North Carolina's denial of plaintiffs' petition for rehearing (App. at 27a) is reported at —— N.C. ——, —— S.E.2d —— (1998). The opinion of the Supreme Court of North Carolina (App. at 1a-21a) is reported at 347 N.C. 473, 495 S.E.2d 711 (1998). The opinion of the North Carolina Court of Appeals (App. at 22a-26a) is reported at 125 N.C. App. 288, 480 S.E.2d 410 (1997). The decision of the North Carolina Industrial Commission (App. at 28a-31a) is un-

reported. The decision of Deputy Commissioner Bernard Alston (App. at 32a-33a) is unreported.

JURISDICTION

The Supreme Court of North Carolina denied plaintiffs' petition for rehearing on 2 April 1998. (App. at 27a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

The Federal OSHA Act provides, in pertinent part, that "Congress declares its purpose * * * to assure so far as possible to every working man and woman in the Nation safe and healthful working conditions." 29 U.S.C.S. § 651 (1990). It further provides that, where a state assumes "responsibility for development and enforcement therein of occupational safety and health standards," it must ensure that the "standards (and the enforcement of which standards) are or will be at least as effective in providing safe and healthful employment and places of employment as the standards promulgated under [the Federal OSHA Act]." 29 U.S.C.S. § 667 (1990). Where the federal government administers an OSHA program, its negligent performance resulting in worker injury is actionable under the Federal Tort Claims Act "in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C.S. § 2674 (1990). The Supreme Court of North Carolina concluded under its Tort Claims Act, N.C. Gen. Stat. § 143-291 (1996), that North Carolina may not be liable for negligent enforcement of its State OSHA program by reason of the "public duty doctrine." Thus, it has allowed North Carolina to provide less protection to North Carolina workers than is provided to workers under federal OHSA. This decision, therefore, violates federal law, which requires a contrary result.

STATEMENT

A. A Case of Governmental Indifference.

1. *Summary.*

This case arises out of one of the worst industrial disasters in American history—the catastrophic fire of 3 September 1991 at the Imperial Food Products Plant in Hamlet, North Carolina. The fire resulted in twenty-five fatalities and profound personal injuries to dozens of other victims. After the fire, the United States Department of Labor conducted an investigation that revealed a gross dereliction of duty by the North Carolina Department of Labor and its Division of Occupational Safety and Health (sometimes, "defendants"), which had voluntarily undertaken control in North Carolina of occupational safety and health programs from the federal government. As part of this undertaking, defendants accepted the statutory and quasi-contractual duty to enforce the state OSHA program at least as effectively as the federal government enforces the federal program. As a *quid pro quo* for the State's undertaking, the federal government was excluded from any role in enforcing occupational safety and health laws in North Carolina.

As shown below, defendants failed miserably in their enforcement and inspection duties, proximately causing the injuries and deaths complained of in this action. Yet, the Supreme Court of North Carolina allowed defendants to avoid liability for their egregious negligence under the state's Tort Claims Act by defining defendants' duties as flowing generally to the public at large, rather than to the affected workers. This holding conflicts with a number of federal court decisions, including at the Circuit Court of Appeals level, interpreting the Federal OSHA Act and the Federal Tort Claims Act, 28 U.S.C.S. § 2671 *et seq.* (sometimes, "FTCA"). These courts have recognized that the Federal OSHA Act can, in appropriate circumstances, give rise to duties owed by the federal

government to individual workers who may pursue negligence claims against it under the FTCA. Therefore, the decision below violates federal law because it allows a state to provide less protection to workers under the state's OSHA program that is provided by the federal program.

By barring plaintiff's claims under the "public duty doctrine" without even acknowledging the State's duty under federal law, the Supreme Court of North Carolina has not only ignored that law, it has flouted the will of Congress. Failure to rectify this error will allow defendants to continue: (1) to violate the federal mandate they have voluntarily undertaken without incurring any adverse consequences; (2) to have no accountability to victims of their negligence; and (3) to enjoy an immunity from suit that the Federal OSHA Act does not permit.

2. *The Hamlet fire and its aftermath.*

On 3 September 1991, the claimants or their decedents (collectively, "claimants" or "plaintiffs") were lawfully on the premises of the Imperial Foods Products, Inc. ("Imperial") plant in Hamlet, North Carolina, attending to their respective employment duties. Imperial was engaged in processing chickens at this site when a hydraulic line near a deep fat fryer ruptured, igniting hydraulic fluid just a few feet away from a natural gas fume cooker used in chicken preparation. The line sprayed flammable hydraulic fluids at high pressure against the floor and the nearby cooker. The resulting fire grew in intensity and spread through the interior of the plant, causing toxic gases and black smoke to build throughout the building. Because escape routes were either non-existent or had been locked or blocked, the toxic gases overcame many of the claimants, killing twenty-five and causing many others severe personal injuries such as brain damage, loss of motor capacity, pulmonary incapacity, and near-total blindness.

After the fire, defendants carried out their first and only inspection in the eleven-year period that Imperial operated the Hamlet plant. A single prior inspection would have revealed the plant had unmarked, inadequate, inaccessible and blocked exits, inadequate or no fire suppression systems, and other conditions violating the Occupational Safety and Health Act of North Carolina ("OSHANC").[1]

Defendants discovered in their post-accident inspection that the Imperial plant was teeming with fire hazards and other conditions violative of the Federal OSHA Act and OSHANC standards. Defendants issued against Imperial eighty-three citations for violaitons of OSHANC standards, most classified as "willful." Among the worst were citations for maintaining locked, blocked and inoperable exit doors that shut off any chance for workers to escape.

3. ***Defendants' duties.***

Over twenty-five years ago, Congress enacted the Occupational Safety and Health Act of 1970, now codified at 29 U.S.C.S. § 651 *et seq.* (1990) (sometimes, "Federal OSHA Act"). Pursuant to the Act, the United States Department of Labor has established standards regulating workplace safety and has implemented enforcement mechanisms. As an alternative to federal administration, the Federal OSHA Act allows states to assume responsibility for development and enforcement of its standards. 29 U.S.C.S. § 667 (1990).

A state program (sometimes "State OSHA Program") must be at least as effective in providing safe and healthful employment and places of employment as the stand-

---

[1] For all practical purposes, OSHANC is identical to the Federal Occupational Safety and Health Act of 1970, as amended, 29 U.S.C. § 651 *et seq.* (sometimes "the Federal OSHA Act"), and the regulations promulgated thereunder. 29 C.F.R. § 1901.1 *et seq.* *Compare* Title 29 of the Code of Federal Regulations *with* Title 13 of the North Carolina Administrative Code.

ards promulgated under the federal OSHA Act. 29 U.S.C.S. § 667(c) (1990). State OSHA programs must provide for sufficient legal authority and qualified personnel to enforce standards and must have adequate funds devoted to administration and enforcement. *Id.* Only then may a plan be approved. Each state with an approved OSHA program has a continuing obligation to provide safety standards, funding, staffing and enforcement at least as effective as that provided under the Federal OSHA Act and regulations. 29 U.S.C.S. § 667(c,f) (1990); 29 C.F.R. § 1902.3 *et seq.*

On 26 January 1973, the United States Department of Labor gave its initial approval to North Carolina's proposed plan for adopting and enforcing workplace safety and health regulations. It certified the program as having completed all developmental steps on 6 October 1976. The North Carolina Department of Labor was designated as the state agency responsible for administering OSHANC. N.C. Gen. Stat. § 95-126(b) (1993). The Division of Occupational Safety and Health, a division of the North Carolina Department of Labor, was established under N.C. Gen. Stat. § 95-133 and is charged with the duty of carrying out North Carolina's State OSHA program.

4. ***Defendants breached duties owed to plaintiffs.***

The foregoing federal statutes and regulations impose on defendants a legal duty to maintain and enforce the State OSHA Program at the same level of effectiveness as the federal OSHA program. 29 U.S.C.S. § 667 (1990). Yet, when the United States Department of Labor investigated defendants' program as a result of the Hamlet fire, it determined defendants had failed to carry out their duties at the requisite level. Significantly, defendants failed to use funds that had been made available by the federal government for hiring and training of inspectors and carrying out inspections. In fact, defendants had *refunded* money provided for these purposes to the fed-

eral government. Defendants' inadequate performance included an insufficient number of inspectors and inspections, insufficient programs for planned inspection of industries, failure to provide or obtain adequate funding or personnel for inspection, failure to discharge their duties, and maintenance of a workplace safety program at a less effective level than the federal program.

The United States Department of Labor's inquiry and investigation thus established serious violations of defendants' statutory duties under 29 U.S.C. § 667. More importantly, by carrying out a completely inept OSHA program, defendants also breached their duties to the people working at the Hamlet plant.

Defendants' failure ever to inspect Imperial's Hamlet plant while it was operational did not occur in a vacuum. It continued even though two prior fires had occurred at the plant. Defendants knew or in the exercise of reasonable care should have known of both fires, but they did not inspect the plant either before or after the occurrences. Even a cursory inspection would have revealed the plant's unmarked, inadequate, inaccessible, locked and blocked exits, and its inadequate fire suppression systems.

By contrast, Imperial operated an out-of-state facility that federal OSHA inspectors visited regularly. In 1985, federal OSHA inspectors concluded that employees at Imperial's Moosic, Pennsylvania plant were being exposed to unprotected hot oil lines running near the floor between a fryer and an oven. In an incident hauntingly similar to the Hamlet catastrophe, one of these lines burst and caused an employee to sustain burns over 35% of her body, resulting in federal OSHA citations being issued to Imperial.

Two years later, in 1987, a federal OSHA inspector again cited Imperial for conditions at its Moosic plant. The inspector determined that employees were not adequately protected from fire hazards because the means of ingress and egress were improperly constructed and

labeled and were not adequately accessible. Federal OSHA issued citations to Imperial and found that its top management had demonstrated hostility and an "utter contempt for OSHA." This information, and the information about the 1985 incident, was available to defendants. Despite actual or constructive notice of the repeated fires and fire hazards, both in North Carolina and in Pennsylvania, defendants still failed to inspect the Hamlet plant.

5. ***Defendants' inspections after the 3 September 1991 fire.***

Defendants inspected Imperial's Hamlet plant after the disastrous 3 September 1991 fire and found conditions causing them to issue eighty-three OSHANC citations. They discovered, among other conditions, that Imperial had failed to: maintain a fire suppressant sprinkler system as required by law; provide proper evacuation plans and means of egress should the plant catch fire; provide unlocked, unblocked and operable exits as required by law; require adequate safety precautions considering the highly flammable substances being used in the presence of cooking and frying operations and the highly corrosive materials being used; label or identify exits adequately so that the employees could find their way out of the plant in the event of a fire; provide adequate fire alarm facilities to alert employees; conduct fire exit drills in order to create an orderly means of escape; and train employees in fire extinguisher used and fire containment in emergencies.

Had defendants fulfilled their legal duties, such as inspecting the plant at reasonable intervals during the eleven years preceding the fire, these conditions would have been discovered and corrected, and the catastrophic events of 3 September 1991 would not have occurred. But defendants did not do what reasonable prudence and the statutes justifying and governing their existence required. Instead, they egregiously breached their duties to plain-

tiffs, leaving twenty-five people dead and at least eighty-one others injured.

Among the tragic aspects of this case is that the fire would have been prevented if defendants had not actively engaged in conduct that precluded federal OSHA involvement. If the Federal OSHA authoriites had been responsible for inspection and enforcement in North Carolina, they would have provided the protection contemplated by OSHA. That federal authorities were regularly inspecting Imperial's facility in Pennsylvania—a jurisdiction where negligent OSHA inspections are actionable—while the Hamlet facility was ignored eleven years by State OSHA authorities, illustrates the serious deviations between the two sets of OSHA compliance programs.

B. Proceedings Below.

Each of the plaintiffs timely filed a verified claim against the proper defendants in the North Carolina Industrial Commission as required by the North Carolina Tort Claims Act. The claims alleged the factual and legal bases for relief as set forth above. Defendants made motions to dismiss pursuant to Rules 12(b)(1), (2), and (6) of the North Carolina Rules of Civil Procedure, which are identical to their federal counterparts. Deputy Commissioner Bernard Alston denied defendants' motions to dismiss. Defendants then availed themselves of an interlocutory right of appeal pursuant to N.C. Gen. Stat. § 1-277(b). The matter was considered by the full North Carolina Industrial Commission, which, on 19 December 1995, affirmed the decision of Deputy Commissioner Alston and ruled that the case could go forward.

Defendants took a further interlocutory appeal to the North Carolina Court of Appeals. In a unanimous decision reported at 125 N.C. App. 288, 480 S.E.2d 410 (1996) (App. at 22a-26a), the Court of Appeals affirmed the decision of the Industrial Commission. Defendants

then petitioned the Supreme Court of North Carolina for discretionary review, which was allowed.

In a 5-2 opinion, rendered on 6 February 1998, the Supreme Court of North Carolina reversed the decision of the Court of Appeals and held, for the first time, that North Carolina's "public duty doctrine," which had been previously applied only to local governments, would now be extended to claims brought against a state agency under the North Carolina Tort Claims Act. *Stone v. Department of Labor*, 347 N.C. 473, 495 S.E.2d 711 (1998) (App. at 1a-21a). The Court's reasoning was that "the governmental entity owes no particular duty to any individual claimant [and] cannot be held liable for negligence for a failure to carry out its statutory duties." (App. at 11a) (citing *Braswell v. Braswell*, 330 N.C. 363, 370, 410 S.E.2d 897, 901 (1991)). The Court further opined that, under the North Carolina Tort Claims Act, "[p]rivate persons do not possess public duties. Only governmental entities possess authority to enact and enforce laws for the protection of the public." (App. at 6a). It went on to reason that " '[A] government ought to be free to enact laws for the *public protection* without thereby exposing its supporting taxpayers . . . to liability for failures of omission in its attempt to enforce them. It is better to have such laws, even haphazardly enforced, than not to have them at all." *Grogan* [*v. Commonwealth*], 577 S.W.2d [4,]6 (emphasis added)." (App. at 10a).

The North Carolina court failed to acknowledge that, by undertaking OSHA enforcement responsibilities in North Carolina, defendants were required to assume, at a minimum, a set of federal duties below which state duties could not fall. The Court ignored the proposition that State OSHA standards, inspection, and enforcement could not be less effective than those imposed by federal OSHA.

Overlooking the federal requirement imposed on the State enabled the Court to use state policies to undergird its opinion—policies that might have been appropriate in an exclusively state-law setting. It is, however, *Congres*'s policy, as declared in the Federal OSHA Act, that must be oberved by state and federal courts in deciding cases in the OSHA arena.[2] The Supreme Court of North Carolina, therefore, erred in contravention of federal law by concluding that the public duty doctrine barred plaintiffs' claim on the basis of the state policies underlying the doctrine.

Although this case arises primarily out of a negligent failure to inspect rather than a negligently performed inspection, North Carolina tort law does not distinguish between acts and omisions for purposes of determining the State's liability. *Phillips v. N.C. Dept. of Transportation,* 80 N.C. App. 135, 341 S.E.2d 339 (1986). Nor do the North Carolina Tort Claims Act and cases interpreting it distinguish between discrtionary, proprietary, or governmental functions in determining the tort liability of the State. *Guthrie v. State Ports Authority,* 307 N.C. 522, 533, 209 S.E.2d 618, 624 (1983).

If such distinctions do exist under federal law, whether by virtue of the discretionary function exception to the FTCA or otherwise, *see, e.g.*, 28 U.S.C.S. § 2680(a) (1990); *Berkovitz v. United States,* 486 U.S. 531, 108 S. Ct. 1945, 100 L.Ed.2d 531 (1988), that factor is not a barrier to consideration of this case. The federal question in this case is to whom the OSHA authorities, state and federal, owe a *duty,* not what circumstances may render those entities immune from liability for negligent

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[2] Petitioners note that defendants' conduct also invokes jurisprudential questions under the Supremacy and Equal Protection clauses of the United States Constitution. In the interest of brevity, the discussion herein is limited to the legislative context. Should the Court request briefing on the constitutional issues, petitioners are happy to oblige.

malfeasanec. Therefore, the decision of the Supreme Court of North Carolina is not based on an adequate and independent state ground, *see e.g., Standard Oil Co. v. Johnson*, 316 U.S. 481, 62 S. Ct. 1168, 1170 (1942); and the federal law-based duty to individual workers necessarily vitiates the decision below.[3]

Any claims that may later arise against defendants for a negligently performed OSHA inspection are so clearly barred under *Stone*, that they would not be filed at all, and thus review would never lie in this Court. If the situation is to be rectified, it must be done in this case. Any other result would allow a direct conflict to continue between North Carolina's interpretation of duties owed by State OSHA occupational safety and health law and a proper decision rendered recently by the United States Court of Appeals for the First Circuit. *Irving v. United States*, No. 96-2368, 1998 WL 152941 (1st Cir. (N.H.), April 8, 1998).

Even though plaintiffs' claims were largely based upon deviation by defendants from the standards of care mandated by Federal OSHA, the Supreme Court of North Carolina refused to acknowledge in its opinion that there was a federal basis for these claims. Consequently, though it was not explicit, the "necessary effect of the [the court's] judgment [was] to deny the [federal] claim." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67, 73 L.Ed. 184, 187 (1928). Given that the United States

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[3] In fact, the sweep of the public duty doctrine announced in *Stone* is so broad as to bar *all* inspection-based claims. In *Hunt v. Department of Labor*, 348 N.C. 192, 499 S.E.2d 747 (1998), a companion case to *Stone*, the Supreme Court of North Carolina invoked the public duty doctrine to preclude recovery from the Department of Labor where the inspection (in that instance, of an amusement park ride) had actually occurred, but was negligently performed. Consequently, it is apparent that there is no distinction under the North Carolina public duty doctrine between negligent inspections and failures to inspect.

Department of Labor had taken the North Carolina Department of Labor to task for gross disregard of duties under federal law—a situation extensively briefed by plaintiffs below—it is astonishing that the Supreme Court of North Carolina refused even to acknowledge the federal mandate in its *Stone* opinion.

On 13 March 1998, plaintiffs timely petitioned the Supreme Court of North Carolina for rehearing. The Court denied the petition on 2 April 1998. (App. 27a).

REASONS FOR GRANTING PETITION

I. THE SUPREME COURT OF NORTH CAROLINA'S DETERMINATION THAT OCCUPATIONAL SAFETY AND HEALTH LEGISLATION DOES NOT CREATE ANY DUTIES TO INDIVIDUAL WORKERS IS CONTRARY TO THE FEDERAL OSHA LEGISLATION, CONTRARY TO THE LAW AS DECLARED BY THIS COURT, AND STANDS IN DIRECT CONFLICT WITH THE DECISION OF THE FIRST CIRCUIT COURT OF APPEALS IN *IRVING v. UNITED STATES.*

This case has its roots in the will of Congress. In reponse to a shocking number of workplace injuries, Congress passed the Occupational Safety and Health Act of 1970. That legislation provides, in pertinent part, as follows:

> § 651 CONGRESSIONAL STATEMENT OF FINDINGS AND DECLARATION OF PURPOSE AND POLICY.
>
> [(a)] The Congress finds that personal injuries and illnesses arising out of work situations impose substantial burdens upon, and are a hindrance to, interstate commerce in terms of lost production, wage loss, medical expenses, and disability compensation payments.
>
> (b) The Congress declares it to be its purpose and policy, through the exercise of its powers to

> regulate commerce upon the several States . . . and to provide for the general welfare, *to assure so far as possible every working man and woman in the Nation safe and healthful working conditions* and to preserve our human resources . . . (9) by providing for the development and promulgation of occupational safety and health standards; [and] (10) by providing an effective enforcement program.

29 U.S.C.S. § 651 (1990) (emphasis added). The text of the Act itself focuses not on "the public" at large, but rather on the individual laborer. This Court has declared that the "fundamental objective of the Act [is] to prevent occupational deaths and serious injuries. The Act, in its preamble, declares that its purpose is 'to assure so far as possible every working man and woman in the Nation safe and healthful employment and places of employment and to *preserve* our human resource.' " *Whirlpool Corp.* v. *Marshall,* 445 U.S. 1, 11-12, 100 S. Ct. 883, 890, 63 L.Ed.2d 154 (1980) (emphasis in opinion). In fact, as noted in *Whirlpool,* the OSHA "Act's legislative history contains numerous referenes to the Act's preventive purpose and **to the tragedy of each individual death or accident."** *Id.* (n.16) (emphasis added).

This Court has closely focused on the legislative history and intent:

> As stated by Senator Yarborough, a sponsor of the Senate bill:
>
> "We are talking about people's lives, not the indifference of some cost accountants. We are talking about assuring the men and women who work in our plants and factories that they will go home after a day's work with their bodies intact."

Id. (citations omitted). The *Whirlpool* decision itself protected even a single individual under the Federal OSHA Act:

> The Act does not wait for an employee to die or become injured. It authorized the promulgation of health and safety standards and the issuance of citations in the hope that these will act to prevent deaths or injuries from ever occurring. It would seem anomalous to construe an Act so directed and constructed as prohibiting an employee, with no other reasonable alternative, the freedom to withdraw from a workplace environment that he reasonably believes is highly dangerous.

Id., 100 S. Ct. at 890-91, 63 L.Ed.2d 154.

While "OSHA inspectors cannot be present around the clock in every workplace," *Whirlpool*, 445 U.S. at 13, 100 S. Ct. at 891, 63 L.Ed.2d 154, there is nothing in *Whirlpool*, or any other decision of this Court, which suggests that the Act is a mere suggestion of good practice to the responsible governmental entities. Instead, the Federal OSHA Act is "safety legislation [that] is to be liberally construed to effectuate the congressional purpose." *Id.* at 13, 100 S.Ct. at 891, 63 L.Ed.2d 154. Thus, despite what the Supreme Court of North Carolina may think about occupational safety and health legislation, Congress had no notion of benefitting only the public at large. The OSHA legislation focuses on the rights and interests of individuals in the workplace.

Of the lower courts, the United States Court of Appeals for the First Circuit has been the most faithful to these propositions. It has followed *Whirlpool* in holding that the federal OSHA legislation is "a remedial statute . . . to be liberally construed in favor of its intended beneficiaries." *Practico v. Portland Terminal Co.*, 783 F.2d 255, 261 (1st Cir. 1985). In *Irving v. United States*, No. 96-2368, 1998 WL 152941 (1st Cir. (N.H.), April 8, 1998), that court affirmed the decision of the United States District Court for the District of New Hampshire and held that the United States can be liable for negligent inspections by OSHA compliance officers operating under the auspices of the United States Department of Labor.

The Federal OSHA inspectors in *Irving* had visited the plaintiff's place of employment in a Somerset, New Hampshire shoe factory on more than one occasion during the late 1970's. Yet, their negligent inspections failed to disclose that the plaintiff was working in close proximity to a hazardous machine in violation of OSHA standards. On 10 October 1979, the plaintiff's hair came in contact with equipment and scalped her, resulting in gruesome and permanent injuries.[4]

The *Irving* court rejected the argument that claims arising out of negligent OSHA inspections fell outside the scope of FTCA liability as being uniquely governmental functions with no private analogy. There was simply no "general exemption [under the Federal Tort Claims Act] that immunizes conduct in the course of federal regulatory inspection." *Irving*, 1998 WL at 13. Thus, the court stated as follows:

> We conclude that, standing alone, a tortfeasor's uniquely governmental purpose in undertaking to act is insufficient to remove the challenged conduct from the scope of the FTCA's waiver of sovereign immunity, and that the pertinent inquiry . . . is whether state law makes a private individual (not the state or other political entity) liable for the asserted failure to exercise due care under similar (not identical) circumstances.

Id. at 22.

There is no suggestion in *Irving*, or in any cases that plaintiffs' research has disclosed involving claims brought under the FTCA for negligent governmental inspections, that the government is immunized because there is no identical conduct counterpart in private life. Rather, the pertinent decisions of this Court are to the contrary. In

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[4] Despite having filed her claim in the early 1980's, the plaintiff's action was not finally adjudicated until 1998, as it wound its way up and down the First Circuit appeal process. *See, e.g., Irving v. United States*, 909 F.2d 598 (1st Cir. 1990).

Indian Towing Co. v. United States, 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955), the United States Coast Guard was held liable for the negligent maintenance of a light house. There, this Court rejected the proposition that the federal goevrnment, when acting in a "uniquely governmental" capacity, was somehow immune from liability merely because private persons do not operate coast guards.

The question then arises whether an immunity available to a state entity under state law would also be available to the Federal Government under the FTCA. In short, can the United States invoke a state public duty doctrine to protect itself? That question was answered in the negative in *Rayonier Incorporated v. United States*, 352 U.S. 315, 77 S.Ct. 374 (1957). There, the plaintiffs sued the United States "for losses which they alleged were caused by the negligence of employees of the United States in allowing a forest fire to be started on Government land and in failing to act with due care to put this fire out." *Id.* at 315, 77 S.Ct. at 375. The facts forming liability were that the United States had permitted a railroad to run through its land. An engine gave off sparks that, in turn, ignited fires causing the plaintiffs to sustain property damage. The plaintiffs alleged that the Forest Service, which took "exclusive direction and control of all fire suppression activities," *id.*, did not exercise reasonable care in doing so, thereby failing to prevent the fires and, once they occurred, failing to quench them. *Id.* at 316-17, 77 S.Ct. at 375.

The District Court and Circuit Court of Appeals rejected plaintiffs' claims. This Court reversed. It characterized the Government's meritless argument as follows:

> [The Government argues that the FTCA only] imposes liability on the United States under circumstances where governmental bodies have traditionally been responsible for the misconduct of their employees and neither the common law nor the law of

> Washington imposes liability on municipal or other local governments for the negligence of their agents acting in the 'uniquely governmental' capacity of public firemen.

Id. at 318-19, 77 S. Ct. at 376-77.

The Court would not accept this argument.

> [A]s we recently held in *Indian Towing Co. v. United States,* 350 U.S. 61, 76 S.Ct. 122, the test established by the Tort Claims Act for determining the United States' liability is whether a private person would be responsible for similar negligence under the laws of the State where the acts occurred. We expressly decided in *Indian Towing* that the United States' liability is not restricted to the liability of a municipal corporation or other public body and that an injured party cannot be deprived of his rights under the Act by resort to an alleged distinction, imported from the law of municipal corporations, between the Government's negligence when its acts in a "proprietary" capacity and its negligence when it acts in a "uniquely governmental" capacity.

Id. at 318-19, 77 S.Ct. at 376-77 (footnote omitted). Thus, this Court has rejected the notion that there is a "public duty doctrine" available to protect the United States either under the FTCA itself, *see Indian Towing*, or where the jurisdiction whose substantive tort law governs the underlying claim recognizes such a defense for the governmental activities of the State. *See Rayonier.*

Irving harmonized these concepts and applied them to allow recovery from the United States for Federal OSHA's negligence in the occupational safety and health context. Obviously, the duty to inspect in *Irving* arose under the Federal OSHA Act; it is what put the inspector in the Somerset plant in the first place. In addition, while the "law of the State where the challenged conduct occurred is the only controlling authority as to the question of negligence," *Irving*, 1998 WL 152941 at 16, the duty

arising under federal law is "evidence of the scope of the duty owed to the . . . claimant under state tort law." *Id.* at 17. "[A]lthough a federal duty may govern the conduct of a governmental employee in a given circumstance, a state-law duty may very well arise in consequence of the activity itself." *Id.* at 18. Because private persons undertaking workplace inspections have the duty to fulfill that undertaking in the exercise of reasonable care, *id.*, the government, when fulfilling the same function, has the duty to do so as well:

> [H]aving exercised its authority under the OSH Act to promulgate regulations and standards defining what constitutes workplace safety, and having undertaken the role of determining whether a workplace compiles with those standards, OSHA and its employees are not thereby free to determine compliance in a negligent manner.

Id. at 24.[5] *Irving* thus makes it clear that certain people, like the plaintiff in *Irving* and the claimants here, are entitled to recover as "foreseeable plaintiff[s] within the orbit of risk created by the negligence of the OSHA compliance officers." *Id.* at 35.

Irving is not the only decision addressing the scope and importance of duties to individual workers under the Federal OSHA Act and related legislation. The Third Circuit, and various districts operating within it, also take seriously the statutory mandate. "In light of the OSH Act's broad remedial purpose, the Act and regulations issued pursuant to it should be liberally construed so as to afford the broadest possible protection to workers." *E&R Erectors, Inc. v. Secretary of Labor*, 107 F.3d 157 (3rd Cir. 1997) (citing *Whirlpool*, *supra*, 445 U.S. at

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[5] Notably, the *Irving* Court did not import the public duty doctrine from New Hampshire law. Like North Carolina, New Hampshire recognizes the doctrine as a means to protect governmental entities from liability for their negligence. *Hartman v. Town of Hooksett*, 488 A.2d 12 (N.H. 1984) (adopting the public duty doctrine).

12-13, 100 S.Ct. at 590-91, 63 L.Ed.2d 154). In *Blessing v. United States*, 447 F. Supp. 1160 (E.D. Pa. 1978) the United States District Court for the Eastern District of Pennsylvania considered a suit that arose out of the negligent inspection of work sites by Federal OSHA. The court stated as follows:

> In order to place the governmental inspections challenged in these cases in their proper statutory setting, we observe that the Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-678 [hereinafter "Act"], was enacted for the purpose of reducing nationwide the number and severity of work-related illnesses and injuries—just the sort of injuries suffered by the plaintiffs in these cases. Recognizing the national scope of the health and safety problem it confronted and the human and economic cost that existing conditions imposed, Congress established a comprehensive program of regulation, research and education that calls for the cooperation of and assumption of responsibilities by employers, employees, and both federal and state agencies.

Id. at 1165 (brackets in the original; footnotes omitted).

The *Blessing* plaintiffs did not claim a private right of action against the United States under the OSH Act itself. *Id.* at 1166; *See also, Cort v. Ash*, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). Rather, their position was as follows:

> [P]laintiffs' claims center on principles of common law tort, made applicable to claims against the United States by the FTCA, whereby one is rendered liable to another for breach of a duty voluntarily assumed by affirmative conduct, even when that assumption of duty is gratuitous. *See* Restatement (Second) of Torts §§ 323, 324A (1965). Succinctly put, it is their contention that, having undertaken to make particular inspections pursuant to the Occupational Safety and Health Act, the government assumed a duty to plaintiffs not to conduct those inspections negligently.

Id. at 1166. After determining that these suits where not barred by the discretionary function exception to the Federal Tort Claims Act, *id.* at 1167-86, the *Blessing* court went on to determine that plaintiffs had stated a claim upon which relief can be granted. *Id.* at 1200.

These cases make clear that federal OSHA authorities do have duties, given them by the Act and regulations promulgated thereunder, and that these duties are owed to individual workers. Under appropriate circumstances, therefore, individual workers injured by the government's negligent performance of these duties may recover in tort against the government under the FTCA. The government is not immunized by doctrines like the public duty doctrine and the discretionary function exception.

The key to this case is the proposition that defendants can have no lesser duties than the federal government would have if it were operating the occupational safety and health program in North Carolina. 29 U.S.C.S. § 667 (1990). Otherwise, the tort law incentive to exercise reasonable care would disappear, and the workers of North Carolina would be exposed to greater risk than workers under federally supervised OSHA programs. *See, e.g., Prosser and Keeton on Torts*, § 1, at 5-7; § 85 (5th Ed. 1984) (discussing the policies underlying tort law, including allocation of the risk to a blameworthy party). Moreover, injured North Carolina workers would be deprived of remedies that would be available against Federal OSHA for negligence in its inspection activities, *see Irving*, and there would be no state law equivalent under which to shift the risk of loss. Since the public duty doctrine is unavailable to the United States Department of Labor under *Indian Towing* and *Rayonier*, it cannot be available to shield state OSHA authorities from all liability for negligent malfeasance or nonfeasance. This is so in order to provide an equivalent level of protection, both at the enforcement and at the remedial stage, under both State and Federal OSHA programs, as required by 29 U.S.C.S. § 667.

The North Carolina Supreme Court's decision to the contrary must, therefore, be reversed as contrary to federal law and antithetical to Congress's intent when it passed the Federal OSHA Act.

II. THIS CASE SHOULD BE REMANDED TO THE SUPREME COURT OF NORTH CAROLINA FOR FURTHER CONSIDERATION NOT INCONSISTENT WITH THE PROPOSITION THAT FEDERAL LAW PRECLUDES APPLICATION OF THE PUBLIC DUTY DOCTRINE TO BAR PLAINTIFFS' CLAIMS.

North Carolina tort law holds both governmental and private parties liable for negligently failing to take mandated action to ensure the safety of third parties, even where the negligence of others is also present. Thus, the Federal OSHA inspection duty to individual workers can result in tort liability to those workers who are injured by the negligent performance of those inspection duties.

A. Liability exists for failure to take adequate steps where there is a duty to prevent injury.

In *Jordan v. Jones*, 314 N.C. 106, 331 S.E.2d 662 (1985), the evidence showed that although a number of vehicular accidents had occurred at a particular intersection, the North Carolina Department of Transportation failed to erect a caution light. Another collision ensued at the intersection when a bus driver failed to stop at the stop sign, giving rise to the lawsuit. Because the forecast of evidence showed that the Department of Transportation had failed to erect proper signals, summary judgment in its favor was held improper. *Id.* at 109, 331 S.E.2d at 664. Among the bases for the State's liability was its deviation from the federal standard of care set forth in the *Manual of Uniform Traffic Control Devices*, published by the U.S. Department of Transportation, Federal Highway Administration. *Id.* at 109, 331 S.E.2d at 664. Consequently, governmental negligence in failing to com-

ply with federal standards concerning the safety of third persons is actionable in North Carolina. Liability of that sort was only avoided in this case because the Supreme Court of North Carolina decided, contrary to federal law and under the public duty doctrine, that State OSHA authorities had no duty to individual workers.[6]

B. Liability exists in tort for breach of a duty to inspect created by contract.

Liability for negligence in the inspection context may also be present where the duties arise under contract. North Carolina recognizes that the "duty of care, as an essential part of actionable negligence, . . . may and frequently does arise out a contractual relationship, the theory being that accompanying every contract is a common-law duty to perform with ordinary care the thing agreed to be done, and that a negligent performance constitutes a tort as well as breach of contract." *Pinnix v. Toomey*, 242 N.C. 358, 362, 87 S.E.2d 893, 898 (1955) (citing 38 Am. Jur. Negligence § 20). While any duty created by a contract flows to the parties thereto, it extends to foreseeable third parties as well. *Davidson and Jones, Inc. v. County of New Hanover*, 41 N.C. App. 661, 667, 255 S.E.2d 580, 584 (1979).

Contracts often create a duty to inspect properly for the benefit of a third party. For example in *Olympic Products Co. v. Roof Systems, Inc.*, 88 N.C. App. 315, 363 S.E.2d 367 (1988), a property owner was entitled to recover for negligent inspection. A roof manufacturer contracted with a roofing installer to inspect the installed roof at the owner's premises to insure that the manu-

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[6] *Stone* called *Jordan* into question on the one hand, (App. at 8a), but on the other held that it was not changing the law with respect to established doctrine. (App. at 12a). This situation further argues for this Court determining that a federal duty exists, then remanding for further consideration as to the consequences of that duty in tort under state law.

facturer's warranty would apply. *Id.* at 321, 363 S.E.2d at 371. When the improper installation of the roof caused damage to the plaintiff's building, the plaintiff was entitled to recover from the manufacturer for its failure properly to inspect and to require repairs to the roof. *Id.* at 324, 363 S.E.2d at 373.

Similarly, North Carolina has also recognized that citizens of a town may sue a water supply company for the damage based on that company's contract with their town. *Gorrell v. Greensboro Water Supply Co.*, 124 N.C. 328, 32 S.E. 720 (1899). In *Gorrell*, the Court recognized that although the contract in question was between the city and the company, its object was "the comfort, ease and security from fire of the people, the citizens of Greensboro." *Id.* at 333, 32 S.E. 720. The water company's duty of care flowed to the affected citizens.

> The water company did not covenant to prevent the occurrence of fires, nor that the quantity of water agreed to be furnished would be a certain and effectual protection against every fire, and consequently does not in any sense occupy the attitude of an insurer; but it did undertake to perform the plain and simple duty of keeping water up to a designated height in the standpipe.

Gorrell, 124 N.C. at 337, 32 S.E. 720 (quoting *Paducah Lumber Co. v. Paducah Water Supply Co.*, 89 Ky. 340 (1889)).

By voluntarily accepting the responsibilities imposed by the Federal OSHA Act, defendants entered into a relationship with plaintiffs similar to the roofing manufacturer's relationship to the building owner in *Olympic Products* or the water company's relationship to the city residents in *Gorrell*. North Carolina accepted, on defendants' behalf, the federal mandate that the State OSHA program provide standards and enforcement no less effective than that provided by the federal OSHA program. By accepting this responsibility, North Carolina had a

continuing contractual or quasi-contractual duty to "perform with ordinary care the thing agreed to be done." *Pinnix*, 242 N.C. at 362, 87 S.E.2d at 898.

C. Liability exists for an undertaking to provide a benefit to others.

In North Carolina, the consequences of a defendant's voluntary undertakings are actionable in tort. It is widely recognized that:

> [o]ne who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to perform his undertaking.

Restatement (Second) of Torts § 324A (1965).[7] North Carolina has adopted this section of the Restatement. *See Mozingo v. Pitt County Memorial Hospital*, 101 N.C. App. 578, 587, 400 S.E.2d 747, 752 (1991); *Ingle v. Allen*, 71 N.C. App. 20, 26, 321 S.E.2d 588, 594 (1984); *Quail Hollow East Condominium Ass'n. v. Donald J. Scholz Co.*, 47 N.C. App. 518, 522, 268 S.E.2d 12, 15 (1980). In addition to the foregoing factors considered in the Restatement, North Carolina also inquires as to the defendant's intention to benefit a third party, the foreseeability of harm, the degree of certainty that injury has been suffered, the closeness of connection between the defendant's conduct and the injury, the blame attached to the conduct, and the policy of preventing future harm. *Ingle v. Allen*, 71 N.C. App. 20, 27, 321 S.E.2d 588, 594 (1984). Under *Ingle*, defendants' conduct is actionable. Each of the factors to be "balanced" under *Ingle* calls for imposing liability here.

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[7] This doctrine has been described, in its various forms, as the "Good Samaritan doctrine." It provided a basis for negligence liability under New Hampshire law in *Irving*. Given the difference from state to state, plaintiffs have elected to discuss this line of cases as a function of North Carolina law.

Defendants clearly undertook for the protection of workers in North Carolina when they accepted the responsibilities set forth in the Federal OSHA Act and OSHANC. That undertaking required defendants to act with reasonable care to discharge their responsibilities. They egregiously failed to do so.

III. THE QUESTION PRESENTED IS OF NATIONAL SIGNIFICANCE BECAUSE IT AFFECTS EVERY STATE OSHA PROGRAM.

If federal law imposes a duty, there is no federal governmental immunity simply because the actor is engaged in a "uniquely governmental function." Instead, the federal government would be liable in tort under the forum state's substantive negligence law where private persons would be liable for similar conduct. Under the Federal OSHA Act, the proper federal authorities owe duties to individual workers. States may not under the guise of state-created policies and immunities conclude, as did the Supreme Court of North Carolina, that no duty is owed to individual workers by those who conduct a State OSHA program. To permit states to do this would defeat Congress's intent that State OSHA programs must provide worker protection at least as well as the federal program. It would destroy the national uniformity and minimum worker protection Congress intended to impose. It would permit some states, as North Carolina has demonstrated, to flout their Federal OSHA obligations. Finally, and most profoundly, it would render workers like those injured and killed in the Hamlet fire remediless when OSHA inspectors abjectly fail to perform statutory duties established to protect these very workers from precisely the kind of harm that befell them.

CONCLUSION

The Petition for a Writ of Certiorari should be granted, the decision of the Supreme Court of North Carolina reversed, and the case remanded for further proceedings not inconsistent therewith.

Respectfully submitted.

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APPENDIX

APPENDIX

APPENDIX

[Filed 6 February 1998]

IN THE SUPREME COURT
STATE OF NORTH CAROLINA

No. 81PA97

JANET B. STONE; ANNIE B. LOCKLEAR; MARY BARBARA WASHINGTON; CARRIE M. GALLOPS and WILLIAM E. PEELE, JR., Co-Administrators of the Estate of ROSE GIBSON PEELE; JIMMIE BROADY, Administrator of the Estate of MINNIE THOMPSON; LILLIE B. DAVIS; JOHNNY DAWKINS; SHARON E. TOWNSEND; GEORGIA ANN QUICK; RONALD WAYNE POOL; ALFORENCE ANDERSON, Administrator of the Estate of PEGGY JEAN ANDERSON; DAVID MACK ALBRIGHT, Administrator of the Estate of DAVID MICHAEL ALBRIGHT; FRED ERNEST BARRINGTON, SR. and NELSON BARRINGTON, Co-Administrators of the Estate of JOSEPHINE BARRINGTON; PEARLIE GAGNON, Administratrix of the Estate of JOHN R. GAGNON; MATTIE FAIRLEY; MARTHA WATERS; EVELYN WALL; KENNETH WHITE; CONESTER WILLIAMS; JOHN SANDERS; LARRY BELLAMY, Administrator of the Estate of ELIZABETH ANN BELLAMY; SARAH WILLIAMS; NELSON BARRINGTON and LINDA OWENS, Co-Administrators of the Estate of FRED BARRINGTON, JR.; ADA BLANCHARD; AUDREY SUE SCOTT; LETHA TERRY; ELAINE GRIFFIN; KIM MANGUS; SYLVIA MARTIN; GLORIA MALACHI; ALBERTA MCRAE; SANDRA MCPHAUL; EVANDER LYNCH, Administrator of the Estate of JANICE LYNCH; BERNETTA ODOM; THOMAS OATES, III; KATIE NICHOLSON; PAMELA MOORE; PRISCILLA MURPHY; SALLY MURPHY; NORA BUSH; THOMAS COBLE; BRENDA CHAMBERS, Administratrix of the Es-

tate of ROSIE ANN CHAMBERS; BERNARD CAMPBELL; ROSE CHAPPELL; MARTHA NELSON, Administratrix of the Estate of MARTHA RATLIFF; DEBORAH PITTMAN; ANNETTE PIERCE; ZELDA ROBERTS; RICHARD ROBERTS; CLEO REDDICK; DELORES PAUNCY; BOBBY QUICK; DELORES QUICK; LULA SMITH, Administratrix of the Estate of CYNTHIA RATLIFF; WILLIE QUICK; MARY BRYANT; DONNA BRANCH DAVIS; DORIS BOSTIC; RACHEL INGRAM; RICHARD M. LIPFORD; ALICE S. WEBB, Administratrix of the Estate of JEFFREY A. WEBB; BARBARA SHAW; FLORA C. BANKS, Administratrix of the Estate of MARGARET TERESA BANKS; JAMES THOMAS BANKS; LINDA CAROL ELLISON; PAUL SAUNDERS, Administrator of the Estate of MARY LILLIAN WALL; JOANNE PAGE, Administratrix of the Estate of GAIL VIVIAN CAMPBELL; VELMA BUTLER; ROY FUNDERBURK; MARY SUE RICH, Administratrix of the Estate of DONALD BRUCE RICH; PEGGY BROWN, Administratrix of the Estate of MARY ALICE QUICK; CAROLYN M. RAINWATER; MARGIE MORRISON, Administratrix of the Estate of MICHAEL A. MORRISON; SHERMAN MCDONALD; WILLIAM G. HAMILTON and MARIE A. HAMILTON; BRENDA F. BAILEY; ELTON RAY CAFFERATA; PAMELA S. COOPER; WILLIAM KELLY, JR., Administrator of the Estate of BRENDA GAIL KELLY; CATHERINE DAWKINS, Administratrix of the Estate of PHILIP R. DAWKINS; JEANETTE L. SMITH; RUBY BULLARD SELLERS; REGGIE SMITH; CYNTHIA FAYE GRAHAM; WILLIAM WINSTON SMITH, SR.; WILLIAM NOCONDA SMITH, JR.; BETTY EUBANKS, Administratrix of the Estate of CYNTHIA S. WALL; BETTY B. WHITE; DARRELL LEONARD WILKINS, Administrator of the Estate of ROSE LYNETTE JACOBS WILKINS; ANGELA LYNN COULTER, Administratrix of the Estate of JOSIE MAE COULTER; FELTON ALBERT HATCHER; PATRICIA W. HATCHER; MILDRED LASSITER MOATES; OLIN DELLANO MOATES; GLADYS FAYE NOLAN; RONNIE CARROL

NOLAN; HOMER F. JARRELL, Administrator of the Estate of BERTHA JARRELL; LORETTA SCOTT; LORETTA GOODWIN; BENITA INGRAM; MATTIE P. NICHOLSON; MARY ANN DAIREN; MONICA MCDOUGALD; ALISON GRIFFIN; BRENDA MCDOUGALD; and ROY S. MORRISON, JR.

v.

NORTH CAROLINA DEPARTMENT OF LABOR and NORTH CAROLINA DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH DIVISION

WHICHARD, Justice.

Plaintiffs commenced this negligence action against defendants, the North Carolina Department of Labor and its Occupational Safety and Health Division, pursuant to the Tort Claims Act, N.C.G.S. §§ 143-291 to -300.1 (1993) (amended 1994). Plaintiffs sought damages for injuries or deaths resulting from a fire at the Imperial Foods Products plant in Hamlet, North Carolina. Defendants moved, pursuant to N.C.G.S. § 1A-1, Rules 12(b)(1), (2), and (6), to dismiss plaintiffs' claims. Deputy Commissioner D. Bernard Alston denied the motions. The full Commission affirmed and adopted his decision.

The Court of Appeals affirmed. It held that N.C.G.S. § 95-4, which describes the authority, power, and duties of the Commissioner of Labor, imposed a duty upon defendants to inspect the workplaces of North Carolina and that the breach of this duty gave rise to plaintiffs' action for negligence. *Stone v. N.C. Dep't of Labor*, 125 N.C. App. 288, 291-92, 480 S.E.2d 410, 413 (1997). It further held that the public duty doctrine did not apply to actions brought against the State under the Tort Claims Act. *Id.* at 291, 480 S.E.2d at 412. On 5 June 1997 this Court granted defendants' petition for discretionary review.

Because these claims arise upon defendants' motions to dismiss, we treat plaintiffs' factual allegations, which follow, as true. *See Sorrels v. M.Y.B. Hospitality Ventures of Asheville,* 332 N.C. 645, 646, 423 S.E.2d 72, 72 (1992). On 3 September 1991 a fire started in a hydraulic line near a deep fat fryer in the Imperial Foods Products chicken plant (the plant) in Hamlet, North Carolina. The fire grew in intensity and spread rapidly through the interior of the plant. Plaintiffs are either former employees of Imperial Foods who suffered injury in the fire or personal representatives of the estates of employees who died in the fire. They or their decedents (plaintiffs) were lawfully inside the plant at the time of the fire. Plaintiffs could not easily escape the plant or the fire because the exits in the plant were unmarked, blocked, and inaccessible. After the fire the North Carolina Department of Labor and its Occupational Safety and Health Division (defendants) conducted their first and only inspection in the plant's eleven-year history of operation. As a result of this inspection, defendants discovered numerous violations of the Occupational Safety and Health Act of North Carolina (OSHANC), including the plant's inadequate and blocked exits and inadequate fire suppression system. Defendants issued eighty-three citations against Imperial Foods Products for violations of OSHANC standards. Plaintiffs alleged, *inter alia,* that defendants had a duty under OSHANC to inspect the plant, defendants breached that duty by failing to inspect until after the fire, defendants' breach caused plaintiffs' injuries or deaths, and plaintiffs' injuries or deaths entitle them to damages in tort.

Plaintiffs have asserted a common law negligence action against the State under the Tort Claims Act. To recover damages under the common law of negligence, private parties "must establish (1) a legal duty, (2) a breach thereof, and (3) injury proximately caused by such breach." *Kientz v. Carlton,* 245 N.C. 236, 240, 96 S.E. 2d 14, 17 (1957).

Defendants argue that plaintiffs have failed to state a claim upon which relief can be granted because defendants did not owe a duty to the individual plaintiffs due to the public duty doctrine. This doctrine, articulated in *Braswell v. Braswell,* 330 N.C. 363, 370-71, 410 S.E.2d 897, 901-02 (1991), provides that governmental entities and their agents owe duties only to the general public, not to individuals, absent a "special relationship" or "special duty" between the entity and the injured party. Defendants also contend that because plaintiffs have not stated a claim, the Industrial Commission lacks personal and subject matter jurisdiction over defendants.

The issue, whether the Court of Appeals erred in affirming the Industrial Commission's denial of defendants' motions to dismiss, requires resolution of three sub-issues. First, does the public duty doctrine apply to claims brought under the Tort Claims Act? Second, if it does, does it apply to state agencies like defendants? Finally, if the doctrine applies, does an exception to it apply as well?

The Tort Claims Act provides that the State is liable "under circumstances where [it], if a private person, would be liable to the cliamant in accordance with the laws of North Carolina." N.C.G.S. § 143-291. Defendants recognize that the State, like a private person, may be subject to liability for negligence under the terms of this legislation. They contend, however, that they are not liable to plaintiffs because under the public duty doctrine, they owe no legal duty to the individual plaintiffs. Defendants assert that their obligation under N.C.G.S. § 95-4 to inspect workplaces in North Carolina serves the public at large, not individual employees. *See Braswell,* 330 N.C. at 370-71, 410 S.E.2d at 901. Plaintiffs assert, and the Court of Appeals held, that the public duty doctrine does not apply to bar plaintiffs' claims because it does not apply to the liability of a private person,

and under the Tort Claims Act, the State is liable if a private person would be. We disagree, and we reverse the Court of Appeals.

In construing the Tort Claims Act to determine whether it incorporates the common law public duty doctrine, "our primary task is to ensure that the purpose of the legislature, the legislative intent, is accomplished." *Electric Supply Co. of Durham v. Swain Elec. Co.*, 328 N.C. 651, 656, 403 S.E.2d 291, 294 (1991). "Legislative purpose is first ascertained from the plain words of the statute." *Id.* Under the Act the State is liable *only* under circumstances in which a private person would be N.C.G.S. § 143-291.

Private persons do not possess public duties. Only governmental entities possess authority to enact and enforce laws for the protection of the public. *See Grogan v. Commonwealth*, 577 S.W.2d 4, 6 (Ky.) (recognizing that if the State were held liable for a failure to enforce laws and regulations establishing safety standards for construction and use of buildings, the State's *status* as a governmental entity "would be the only basis *for* holding a city or state liable, because only a governmental entity possesses the authority to enact and enforce laws for the protection of the public"), *cert. denied*, 444 U.S. 835, 62 L. Ed. 2d 46 (1979). If the State were held liable for performing or failing to perform an obligation to the public at large, the State would have liability when a private person could *not*. The public duty doctrine, by barring negligence actions against a governmental entity absent a "special relationship" or a "special duty" to a particular individual, serves the legislature's express intention to permit liability against the State only when a private person could be liable. *See Braswell*, 330 N.C. at 370-71, 410 S.E.2d at 901-02. Thus, the plain words of the statute indicate an intent that the doctrine apply to claims brought under the Tort Claims Act.

Our determination of legislative intent is also "guided by . . . certain canons of statutory construction." *Swain Elec. Co.*, 328 N.C. at 656, 403 S.E.2d at 294. Acts, such as the Tort Claims Act, that permit suit in derogation of soverign immunity should be strictly construed. *Floyd v. N.C. State Highway & Pub. Works Comm'n*, 241 N.C. 461, 464, 85 S.E.2d 703, 705 (1955), *overruled in part on other grounds by Barney v. N.C. State Highway Comm'n*, 282 N.C. 278, 284-85, 192 S.E.2d 273, 277 (1972). Statutes in derogation of the common law likewise should be strictly construed. *McKinney v. Deneen*, 231 N.C. 540, 542, 58 S.E.2d 107, 109 (1950).

In passing the Tort Claims Act, the legislature incorporated the common law of negligence. *MacFarlane v. N.C. Wildlife Resources Comm'n*, 244 N.C. 385, 387, 93 S.E.2d 557, 559-60 (1956), *overruled in part on other grounds by Barney*, 232 N.C. at 284-85, 192 S.E. 2d at 277. The public duty doctrine forms an integral part of that common law. *Braswell*, 330 N.C. at 370, 410 S.E.2d at 901. Plaintiffs ask us to construe the Tort Claims Act broadly so as to erase a fundamental common law doctrine. We decline to do so. Until the legislature clearly expresses that immunity is to be waived even in situations in which the common law public duty doctrine would otherwise apply to bar a negligence claim, we construe the Tort Claims Act as incorporating the existing common law rules of negligence, including that doctrine. *See Floyd*, 241 N.C. at 464, 85 S.E.2d at 705; *McKinney*, 231 N.C. at 542, 58 S.E.2d at 109. Any change in the State's sovereign immunity to permit the State to be liable in a situation in which a private person could not should be made by the legislature, not by this Court under the guise of construction.

Plaintiffs argue that even if the public duty doctrine applies to claims brought under the Tort Claims Act, it does not apply in this case. They contend that it applies

only to claims against *local governments* for failure to *prevent crimes.*[1]

When this Court first recognized the public duty doctrine, it discussed the doctrine in terms of the facts before it. *See Braswell,* 330 N.C. at 370, 410 S.E.2d at 901 (addressing the public duty doctrine as it applied to a plaintiff's claims against the Sheriff of Pitt County for failure to provide her with protection). In the context of a claim against a sheriff, we explained that, under the doctrine, "a *municipality* and its agents act for the benefit of the public, and therefore, there is not liability for the failure to furnish *police protection* to specific individuals." *Id.* (emphasis added).

Once this Court recognized the doctrine, however, our Court of Appeals applied it to a variety of local governmental operations. *See, e.g., Simmons v. City of Hickory,* 126 N.C. App. 821, —, 487 S.E.2d 583, 585 (1997) (holding that the public duty doctrine applied to bar claim against city for negligently inspecting home and issuing building permits and stating that "[t]he public duty doctrine has been applied to a variety of statutory governmental duties"); *Sinning v. Clark,* 119 N.C. App. 515, 518, 459 S.E.2d 71, 73 (holding that the public duty doctrine applied to bar a claim against a municipality, the city building inspection and the city code administrator

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1 Plaintiffs also argue that *Jordan v. Jones,* 314 N.C. 106, 331 S.E.2d 662 (1985) (permitting plaintiff to bring a tort action against the Department of Transportation), supports their position that the public duty doctrine does not bar their claim and that they may recover from the State for its negligent failure to take action that could have protected its citizens. *Jordan* was decided before this Court recognized the public duty doctrine in *Braswell,* 330 N.C. at 371, 410 S.E.2d at 902. The Court in *Jordan* did not consider whether plaintiff's claims were barred by the public duty doctrine. Thus, *Jordan* is inapplicable to the question of whether the public duty doctrine applies to claims against the State. Plaintiffs make no argument that the holding and reasoning of *Jordan* fall within one of the exceptions to the public duty doctrine.

for gross negligence in an inspection of a home and stating that this doctrine "has been applied by our [c]ourts to various statutory governmental duties"), *disc. rev. denied*, 342 N.C. 194, 463 S.E.2d 242 (1995); *Davis v. Messer*, 119 N.C. App. 44, 55-56 457 S.E.2d 902, 909 (holding that the public duty doctrine applied to a claim against a fire chief, a fire department, a town, and a county for negligence in their failure to complete their effort to extinguish a fire in plaintiff's home), *disc. rev. denied*, 341 N.C. 647, 462 S.E.2d 508 (1995); *Prevette v. Forsyth County*, 110 N.C. App. 754, 758, 431 S.E.2d 216, 218 (holding that the public duty doctrine applied to bar wrongful death claim againt county and against director and employee of the county animal control shelter for failing to protect plaintiff from dogs which defendants knew were dangerous), *disc. rev. denied*, 334 N.C. 622, 435 S.E.2d 338 (1993). The Court of Appeals has also applied the doctrine to a state agency. *See Humphries v. N.C. Dep't. of Correction*, 124 N.C. App. 545, 547, 479 S.E.2d 27, 28 (1996) (holding that the doctrine barred claim against Department of Correction for alleged negligence in the supervision of a probationer), *disc. rev. improvidently allowed*, 346 N.C. 269, 485 S.E.2d 293 (1997). While this Court has not heretofore applied the doctrine to a state agency or to a governmental function other than law enforcement, we do so now.

The policies underlying recognition of the public duty doctrine in *Braswell* support its application here. In *Braswell* we explained that the doctrine was necessary to prevent "an overwhelming burden of liability" on governmental agencies with "limited resources." *Braswell*, 330 N.C. at 370-71, 410 S.E.2d at 901. We stated:

> "The amount of protection that may be provided is limited by the resources of the community and by a considered legislative-executive decision as to how those resources may be deployed. For the courts to proclaim a new and general duty of protection in the law of tort . . . would inevitably determine how the

> limited police resources . . . should be allocated and without predictable limits."

Id. at 371, 410 S.E.2d at 901 (quoting *Riss v. City of New York*, 22 N.Y.2d 579, 581-82, 240 N.E.2d 860, 860-61, 293 N.Y.S.2d 897, 898 (1968)). Just as we recognized the limited resources of law enforcement in *Braswell*, we recognize the limited resources of defendants here. Just as we there "refuse[d] to judicially impose an overwhelming burden of liability [on law enforcement] for failure to prevent every criminal act," *id.* at 370-71, 410 S.E.2d at 901, we now refuse to judicially impose an overwhelming burden of liability on defendants for failure to prevent every employer's negligence that results in injuries or deaths to employees. "[A] government ought to be free to enact laws for the *public protection* without thereby exposing its supporting taxpayers . . . to liability for failures of omission in its attempt to enforce them. It is better to have such laws, even haphazardly enforced, than not to have them at all." *Grogan*, 577 S.W.2d at 6 (emphasis added).

Further, we do not believe the legislature, in establishing the Occupational Safety and Health Division of the Department of Labor in 1973, intended to impose a duty upon this agency to each *individual* worker in North Carolina. Nowhere in chapter 95 of our General Statutes does the legislature authorize a private, individual right of action against the State to assure compliance with OSHANC standards. Rather, the most the legislature intended was that the Division prescribe safety standards and secure some reasonable compliance through spot-check inspections made "as often as practicable." N.C.G.S. § 95-4(5) (1996). "In this way the safety conditions for work[ers] in general would be improved." *Nerbun v. State*, 8 Wash. App. 370, 376, 506 P.2d 873, 877 (holding that Washington Department of Labor did not owe an absolute duty to individual workers and concluding that the Washington legislature intended only that the

Department act on behalf of workers in general), *disc. rev. denied*, 82 Wash. 2d 1005 (1973).

Because we hold that the legislature intended the public duty doctrine to apply to claims against the State under the Tort Claims Act, we now apply the doctrine to the facts of this case. The general common law rule provides that governmental entities, when exercising their statutory powers, act for the benefit of the general public and therefore have no duty to protect specific individuals. *See Braswell*, 330 N.C. at 370, 410 S.E.2d at 901; *see also DeFusco v. Todesca Forte, Inc.*, 683 A.2d 363, 365 (R.I. 1996) (recognizing that with certain exceptions, "[t]he public duty doctrine shields the state and its political subdivisions from tort liability arising out of discretionary governmental actions that by their nature are not ordinarily performed by private persons"). Because the governmental entity owes no particular duty to any individual claimant, it cannot be held liable for negligence for a failure to carry out its statutory duties. *Braswell*, 330 N.C. at 370, 410 S.E.2d at 901. Absent a duty, there can be no liability. *Kientz*, 245 N.C. at 240, 96 S.E.2d at 17.

In *Braswell* this Court recognized two exceptions to the public duty doctrine "to prevent inevitable inequities to certain individuals." *Braswell*, 330 N.C. at 371, 410 S.E.2d at 901. It explained that exceptions to the doctrine exist: (1) where there is a special relationship between the injured party and the governmental entity; and (2) when the governmental entity creates a special duty by promising protection to an individual, the protection is not forthcoming, and the individual's reliance on the promise of protection is causally related to the injury suffered. *Id.* These exceptions are narrowly construed and applied. *Id.* at 372, 410 S.E.2d at 902; *see also Sinning*, 119 N.C. App. at 519, 459 S.E.2d at 74.

Plaintiffs assert that defendants owed each claimant a duty under N.C.G.S. § 95-4 to inspect the Imperial Foods

Products plant. This statute provides that the Commissioner of Labor is "charged with the duty" to visit and inspect "at reasonable hours, as often as practicable," all of the "factories, mercantile establishments, mills, workshops, public eating places, and commercial institutions in the State." N.C.G.S. § 95-4(5). It also imposes on the Commissioner a duty to enforce these inspection laws and request prosecution of any violations found. N.C.G.S. § 95-4(6). It creates no private cause of action for individual claimants for violations of OSHANC.

Although N.C.G.S. § 95-4 imposes a duty upon defendants, that duty is for the benefit of the public, not individual claimants as here. *Braswell*, 330 N.C. at 370, 410 S.E.2d at 901. Plaintiffs' claims thus fall within the public duty doctrine, and to state claims for actionable negligence, plaintiffs must allege facts placing the claims within one of the exceptions to the doctrine. They make no such "special relationship" or "special duty" allegations. The claims therefore must fail. *See id.* at 371, 410 S.E.2d at 902.

The dissent asserts that we have eviscerated the Tort Claims Act, nullified it, rendered it obsolete, left it purposeless, absolved the State of all liability, and barred all negligence claims against the State. These assertions are hyperbolic and overwrought. A myriad of reported and unreported cases, covering a great variety of fact situations, have allowed recovery against the State under the Tort Claims Act. Nothing in this opinion even hints at the overruling of those cases. Absent legislative change, the Act functions and will continue to function as it has for almost half a century. We simply hold, with sound reason and substantial grounding in the law of both this and other jurisdictions, that in this limited new context, not heretofore confronted by this Court, the Act was not intended to and does not apply absent a special relationship or special duty.

For the reasons stated, the Court of Appeals erred in affirming the Industrial Commission's denial of defendant's motions to dismiss. The decision of the Court of Appeals is therefore reversed, and the case is remanded to the Court of Appeals for further remand to the Industrial Commission for entry of an order of dismissal.

REVERSED AND REMANDED.

Justice ORR dissenting.

The majority opinion erroneously takes a limited and obscure common law concept, the public duty doctrine, which has traditionally applied only to municipalities and their law enforcement responsibilities, and expands the doctrine's application to effectively eviscerate the Tort Claims Act. As a result, the right of individuals to sue the State for negligent acts committed by the State, a right expressly conveyed by the General Assembly, is nullified without the support of any precedential authority permitting such an indulgence. Therefore, I dissent for the reasons which follow.

The recognition of the public duty doctrine in this country is traced to an 1855 decision of the United States Supreme Court. *South v. Maryland,* 59 U.S. 396, 15 L. Ed. 433 (1855). The case involved a negligence suit brought by plaintiffs to recover against a sheriff and his sureties on an official bond for failure to keep the peace and protect the plaintiffs. The Court stated:

> Actions against the sheriff for a breach of his ministerial duties in the execution of process are to be found in almost every book of reports. But no instance can be found where a civil action has been sustained against him for his default or misbehavior as conservator of the peace, by those who have suffered injury to their property or persons through the violence of mobs, riots, or insurrections.

In reviewing this seminal decision and other authorities, I can find no common law basis for the majority taking the public duty doctrine beyond the original bounds of local law enforcement. In *South,* where the doctrine first originated, the public duty doctrine was applied to address only municipalities and law enforcement. This was also the case in *Braswell v. Braswell,* 330 N.C. 363, 410 S.E.2d 897 (1991), where this Court first adopted the public duty doctrine. In *Braswell,* the doctrine was again

only applied to factors involving a municipality and law enforcement. There, Justice Meyer, writing for a unanimous Court, explained:

> The general common law rule, known as the public duty doctrine, is that a municipality and its agents act for the benefit of the public, and therefore, there is no liability for the failure to furnish police protection to specific individuals.

Id. at 370, 410 S.E.2d at 901. Neither *South* nor *Braswell* justify the majority's sudden expansion or enlargement of the doctrine to situations beyond local law enforcement. No mention is made or reference cited by the majority which authorizes this extension, and no common law authority is offered. This judicial amplification, therefore, is not justified, and to the extent that other state jurisdications have bent and skewed the common law to expand the doctrine, we cannot, and should not, follow such an ill-advised course.

Prior to the Tort Claims Act, the State and its agencies were immune from tort liability under the doctrine of sovereign immunity. *Gammons v. N.C. Dep't of Human Resources,* 344 N.C. 51, 54, 472 S.E.2d 722, 723-24 (1996). This common law doctrine of immunity extended protection to government entities for liability for injuries caused by government acts no matter how wanton or reckless the government's conduct. *Davis v. Messer,* 119 N.C. App. 44, 52, 457 S.E.2d 902, 907, *disc. rev. denied,* 341 N.C. 647, 462 S.E.2d 508 (1995); *Wiggins v. City of Monroe,* 73 N.C. App. 44, 49, 326 S.E.2d 39, 43 (1985). When the General Assembly enacted the Tort Claims Act in 1951, it partially waived or eliminated the State's sovereign immunity by allowing actions to be brought against the State in cases where negligence was committed by its employees in the course of their employment. *Gammons,* 344 N.C. at 54, 472 S.E.2d at 723-24. The purpose and effect of the Act was to remove the blanket immunity traditionally enjoyed by the State

under the English common law and permit injured persons to recover against the State for negligent acts, *Lyon & Sons, Inc. v. N.C. State Bd. of Educ.*, 238 N.C. 24, 27, 76 S.E.2d 553, 555 (1953), or omissions, *Phillips v. N.C. Dep't of Transp.*, 80 N.C. App. 135, 341 S.E.2d 339 (1986) (1977 amendment to the Act extended State's liability to include negligent omissions). To ensure this, the legislature made the Act expressly provide that the State is liable "under circumstances where [it], if a private person, would be liable to the claimant in accordance with the laws of North Carolina." U.C.G.S. § 143-291(a) (1996).

In the case *sub judice*, plaintiffs assert negligence claims against the State for its alleged failure to inspect the Imperial Foods Products plant. The public duty doctrine, as enunciated in *Braswell*, does not apply in this case because here: (1) the suit is against the State, not a municipality as in *Braswell*; and (2) the suit involves failure to inspect, not failure to provide police protection as in *Braswell*. Enlarging the doctrine as the majority does in this case means that it will be extended beyond its traditional realm of protecting local law enforcement and will apply to circumstances outside those identified in *Braswell*. The public duty doctrine, moreover, should not be applied here because, unlike in *Braswell*, this suit was brought under the Tort Claims Act. The public duty doctrine should not be used to *grant the State immunity* when the express intent of the Tort Claims Act was to *remove immunity* and make the State liable for its wrongs. Granting immunity to the State under the public duty doctrine makes the Tort Claims Act virtually obsolete. Thus, not only does *Braswell* not justify extending immunity, but the specific language and underlying policy of the Tort Claims Act precludes such an expansion.

The majority, however, attempts to justify its decision on the grounds that the public duty doctrine applies be-

cause: (1) The Tort Claims Act requires the State to be treated like a private person and private persons do not have public duties; (2) The Tort Claims Act incorporates the common law and therefore incorporates the public duty doctrine; (3) the *Braswell* policies support application of the doctrine; and (4) Under OSHANC, the General Assembly never intended for a duty to be imposed. All of these arguments are untenable.

First, it is patently unreasonable to interpret the Act's requirement that the State be treated like a private person as absolving the State of all liability. The very reason for this language is to eliminate the common law doctrine of sovereign immunity. The intent is to allow an individual to assert a suit against the State, the same suit an individual could assert against a private person or entity. The legislative intent of the Act was not to take this right away, especially since there was no liability to take away when this language was chosen and the Act adopted. If the language concerning treatment like a private person had been intended to mean what the majority says it means, i.e., that the State receives immunity, the Act would have no purpose. If that had been the case, the legislature could have just left sovereign immunity in place.

In addition to clashing with the intent of the Act, the majority's interpretation of this language also approves an oblique reading of the Act which necessitates a kind of acrobatic reasoning. The majority asserts that the legislative request to treat the State as a private person really means that the State has immunity. This does not make sense. The legislature did not intend to be so obtuse as to ostensibly take immunity away from the State, yet by including language requiring treatment like a private person, grant it back that very same immunity under the public duty doctrine. Such reasoning would require the Court to read between the lines and discover a whole line of reasoning in the one sentence innocuously address-

ing treatment like a private person. If the legislature had intended to grant the State immunity by requiring that it be treated like a private person it could have simply said such.

The majority's second argument, that the Act incorporates the public duty doctrine because it incorporates the common law, is also erroneous. As previously noted, the public duty doctrine originated in the United States Supreme Court case *South v. Maryland,* 59 US.. 396, 15 L. Ed. 433 (1855). Thereafter, "the public duty doctrine was widely accepted by most state courts." *Ezell v. Cockrell,* 902 S.W 2d 394, 397 (Tenn. 1995). When most states abolished sovereign immunity by statute, the doctrine came under attack. *Id.* at 398. Some state courts abolished the doctrine, arguing that it was simply sovereign immunity under another guise and to apply it was inconsistent with statutes that eliminated immunity. *Id.* Other states, such as Georgia, limited the application of the public doctrine to apply only in situations involving police protection. *Hamilton v. Cannon,* 267 Ga. 655, 482 S.E.2d 370 (1997).

In North Carolina, the common law tradition of the public duty doctrine was never extended by this Court beyond its limited application to municipalities and law enforcement. Second, the North Carolina legislature has never adopted or recognized the public duty doctrine. In fact, this Court only recognized the doctrine for the first time in 1991, and only then, the Court recognized the defense in the most narrow of terms. To argue, as the majority does, that by enacting the Tort Claims Act in 1951, the Legislature somehow incorporated the expansive public duty doctrine enunciated by the majority is at best, simply wrong.

In its third argument, the majority asserts that the *Braswell* rationale of preventing enormous liability on agencies with limited resources applies here as well. This

is misplaced. First, damages are capped under the Tort Claims Act. The "General Assembly amended N.C.G.S. § 143-291(a) so that damages are capped at $150,000 for causes arising on or after 1 October 1994." *Parham v. Iredell County Dept. of Social Services,* 127 N.C. App. 144, ——, 489 S.E.2d 610, 613 (1997). Thus, the majority's fear of an "overwhelming burden of liability" has already been directly addressed by the General Assembly which has chosen, in its legislative capacity, to limit liability as it deemed necessary.

Also, the potential for liability and circumstances in *Braswell* and in this case are very different. In *Braswell,* there was a potential for overwhelming and unlimited liability because the plaintiff was claiming that the police failed to protect her from an unpredictable criminal act. If the police could be liable for such failures, the city would endure enormous liability for all criminal acts it allegedly failed to prevent. In this case, we are dealing with inspections which are required to be carried out on a regular, predictable basis. Here, the duty to perform is clearly set out and can be accomplished. It is feasible. Also, although there may be the inclination to protect the State from suit, this case does not involve determining how "limited police resources should be allocated," as was the issue in *Braswell. Braswell,* 330 N.C. at 371, 410 S.E.2d at 901. Instead, this case is more similar to what we differentiated in *Braswell,* where we stated that dealing with police resources was "quite different from the predictable allocation of resources and liabilities when public hospitals, rapid transit systems, or even highways are provided." *Id.* at 371, 410 S.E.2d at 901-02. Thus, the policies articulated in *Braswell* are also inapplicable.

The fourth and final argument offered by the majority is that OSHANC did not impose a duty to conduct investigations. This is incorrect because N.C.G.S. § 95-4 provides that the Commissioner of Labor is *"charged with*

the duty" to visit and inspect the factories for violations. It is unlikely that the legislature intended inspections only "as often as practicable," as the majority asserts, when it used such express language and included an extended list of requirements or actions that the Commissioner was required to take in order to fulfill this mandated duty.

It must be emphasized that the legislature, by removing sovereign immunity, made a policy decision to allow negligence suits against the state under circumstances and limitations imposed by the Tort Claims Act. Likewise, to the extent the legislature wants to limit lawsuits in the future which are similar to the one before us, it can certainly amend the Act—or abolish it altogether and reimpose sovereign immunity. It is unnecessary and inappropriate for this Court to become the protector of the legislative treasury by undoing what the representatives of the public voted to accomplish.

Finally, it should be noted that other commentators have recognized the many valid, cogent arguments which have been made against extending the public duty doctrine to cases such as this one. As one author noted in his critique of the doctrine.

> [f]irst, the application of the doctrine allows governmental entities to use the shield of sovereign immunity when the legislature no longer mandates such immunity. Second, the application of the doctrine requires that plaintiffs injured by a negligent official suffer solely because of the governmental status of the tortfeasor. Third, the application of the doctrine promotes incompetence by providing no meaningful incentive for the governmental entity to provide the services of optimal quality. Fourth, even with the elimination of the doctrine, plaintiffs must still prove breach of duty, causation, and damages; a vigorous task just like in any other negligence action. Finally, the wide availability of liability insurance allows a

> governmental entity limited to pecuniary exposure while still compensating the injured individual.

Frank Swindell, *Municipal Liability for Negligent Inspections* in Sinning v. Clerk—*A "Hollow" Victory for the Public Duty Doctrine,* 18 Campbell L. Rev. 241, 250-51 (1996). Moreover, other writers have noted that many "jurisdictions [have] abrogated the doctrine of sovereign immunity because of the degree of injustice it caused." John Cameron McMillan, Jr., Note, *Government Liability and the Public Duty Doctrine,* 32 Vill. L. Rev. 505, 529 (1987). By resurrecting sovereign immunity in the guise of the public duty doctrine, the majority perpetuates this injustice and disregards the mandate of the Tort Claims Act to protect injured citizens from government negligence.

Justice FRYE joins in this dissenting opinion.

Feb. 4, 1997

COURT OF APPEALS OF NORTH CAROLINA

No. COA96-207

JANET B. STONE; ANNIE B. LOCKLEAR; MARY BARBARA WASHINGTON; CARRIE M. GALLOPS and WILLIAM E. PEELE, JR., Co-Administrators of the Estate of ROSE GIBSON PEELE; JIMMIE BROADY, Administrator of the Estate of MINNIE THOMPSON; LILLIE B. DAVIS; JOHNNY DAWKINS; SHARON E. TOWNSEND; GEORGIA ANN QUICK; RONALD WAYNE POOL; ALFORENCE ANDERSON, Administrator of the Estate of PEGGY JEAN ANDERSON; DAVID MACK ALBRIGHT, Administrator of the Estate of DAVID MICHAEL ALBRIGHT; FRED ERNEST BARRINGTON, SR. and NELSON BARRINGTON, Co-Administrators of the Estate of JOSEPHINE BARRINGTON; PEARLIE GAGNON, Administratrix of the Estate of JOHN R. GAGNON; MATTIE FAIRLEY; MARTHA WATERS; EVELYN WALL; KENNETH WHITE; CONESTER WILLIAMS; JOHN SANDERS; LARRY BELLAMY, Administrator of the Estate of ELIZABETH ANN BELLAMY; SARAH WILLIAMS; NELSON BARRINGTON and LINDA OWENS, Co-Administrators of the Estate of FRED BARRINGTON, JR.; ADA BLANCHARD; AUDREY SUE SCOTT; LETHA TERRY; ELAINE GRIFFIN; KIM MANGUS; SYLVIA MARTIN; GLORIA MALACHI; ALBERTA MCRAE; SANDRA MCPHAUL; EVANDER LYNCH, Administrator of the Estate of JANICE LYNCH; BERNETTA ODOM; THOMAS OATES, III; KATIE NICHOLSON; PAMELA MOORE; PRISCILLA MURPHY; SALLY MURPHY; NORA BUSH; THOMAS COBLE; BRENDA CHAMBERS, Administratrix of the Estate of ROSIE ANN CHAMBERS; BERNARD CAMPBELL;

ROSE CHAPPELL; MARTHA NELSON, Administratrix of the Estate of MARTHA RATLIFF; DEBORAH PITTMAN; ANNETTE PIERCE; ZELDA ROBERTS; RICHARD ROBERTS; CLEO REDDICK; DELORES PAUNCY; BOBBY QUICK; DELORES QUICK; LULA SMITH, Administratrix of the Estate of CYNTHIA RATLIFF; WILLIE QUICK; MARY BRYANT; DONNA BRANCH DAVIS; DORIS BOSTIC; RACHEL INGRAM; RICHARD M. LIPFORD; ALICE S. WEBB, Administratrix of the Estate of JEFFREY A. WEBB; BARBARA SHAW; FLORA C. BANKS, Administratrix of the Estate of MARGARET TERESA BANKS; JAMES THOMAS BANKS; LINDA CAROL ELLISON; PAUL SAUNDERS, Administrator of the Estate of MARY LILLIAN WALL; JOANNE PAGE, Administratrix of the Estate of GAIL VIVIAN CAMPBELL; VELMA BUTLER; ROY FUNDERBURK; MARY SUE RICH, Administratrix of the Estate of DONALD BRUCE RICH; PEGGY BROWN, Administratrix of the Estate of MARY ALICE QUICK; CAROLYN M. RAINWATER; MARGIE MORRISON, Administratrix of the Estate of MICHAEL A. MORRISON; SHERMAN MCDONALD; WILLIAM G. HAMILTON and MARIE A. HAMILTON; BRENDA F. BAILEY; ELTON RAY CAFFERATA; PAMELA S. COOPER; WILLIAM KELLY, JR., Administrator of the Estate of BRENDA GAIL KELLY; CATHERINE DAWKINS, Administratrix of the Estate of PHILIP R. DAWKINS; JEANETTE L. SMITH; RUBY BULLARD SELLERS; REGGIE SMITH; CYNTHIA FAYE GRAHAM; WILLIAM WINSTON SMITH, SR.; WILLIAM NOCONDA SMITH, JR.; BETTY EUBANKS, Administratrix of the Estate of CYNTHIA S. WALL; BETTY B. WHITE; DARRELL LEONARD WILKINS, Administrator of the Estate of ROSE LYNETTE JACOBS WILKINS; ANGELA LYNN COULTER, Administratrix of the Estate of JOSIE MAE COULTER; FELTON ALBERT HATCHER; PATRICIA W. HATCHER; MILDRED LASSITER MOATES; OLIN DELLANO MOATES; GLADYS FAYE NOLAN; RONNIE CARROL NOLAN; HOMER F. JARRELL, Administrator of the Es-

tate of BERTHA JARRELL; LORETTA SCOTT; LORETTA GOODWIN; BENITA INGRAM; MATTIE P. NICHOLSON; MARY ANN DAIREN; MONICA MCDOUGALD; ALISON GRIFFIN; BRENDA MCDOUGALD; and ROY S. MORRISON, JR.,

Plaintiffs,

v.

NORTH CAROLINA DEPARTMENT OF LABOR and NORTH CAROLINA DEPARTMENT OF LABOR, OCCUPATIONAL SAFETY AND HEALTH DIVISION,

Defendants.

LEWIS, Judge.

Plaintiffs commenced this action under the Tort Claims Act, N.C. Gen.Stat. section 143-291 et. seq., for damages incurred as a result of a 3 September 1991 fire at the Imperial Food Products plant ("the plant") in Hamlet. Plaintiffs allege that defendants negligently failed to inspect the plant for workplace safety violations and failed to enforce workplace safety laws. Defendants moved to dismiss the claims under N.C.R. Civ. P. 12(b)(6) for failure to state a claim and under N.C.R. Civ. P. 12(b)(1) and (2) on the basis of sovereign immunity. Deputy Commissioner D. Bernard Alston denied defendants' motions. The full Commission affirmed and adopted the Deputy Commissioner's decision. Defendants appeal.

Since we are reviewing a ruling on a motion to dismiss, we treat plaintiffs' allegations as true. *See Harris v. NCNB*, 85 N.C.App. 669, 670, 355 S.E.2d 838, 840 (1987). Plaintiffs allege that on 3 September 1991, a hydraulic fuel line near a deep fat fryer in the processing section of the plant ruptured, igniting hydraulic fuel from a natural gas fume cooker. The fire spread rapidly through the plant, killing twenty-five (25) people and injuring fifty-six (56). Defendants had never inspected the plant, despite the occurrence of two other fires at the plant, one in 1980 and another in 1983. When it was

inspected subsequent to the fire in September 1991, the plant was issued eighty-three (83) citations for various violations of the Occupational Safety and Health Act of North Carolina. Plaintiffs allege, inter alia, that defendants' failure to inspect the plant was negligent.

As a preliminary matter, we note that ordinarily, the denial of a motion to dismiss is not immediately appealable. *E.g. Godwin v. Walls,* 118 N.C.App. 341, 344, 455 S.E.2d 473, 477 (1995). However, since defendants' motion is based on sovereign immunity, its denial is properly before us. *See Hawkins v. State of North Carolina,* 117 N.C.App. 615, 622, 453 S.E.2d 233, 237 (1995).

Defendants argue that because they owed no duty to plaintiffs, they cannot be held liable to them under the Tort Claims Act. The first reason they cite for lack of duty is the public duty doctrine. However, in an opinion filed contemporaneously herewith, *Hunt v. North Carolina Department of Labor,* 125 N.C.App. 293, 480 S.E.2d 413 (1997), we reject this argument and hold that the public duty doctrine does not apply in actions brought against State agencies under the Tort Claims Act. Accordingly, this argument has no merit.

Defendants next argue that no duty is imposed by Chapter 95 of the North Carolina General Statutes, entitled "Department of Labor and Labor Regulations." They argue that if Chapter 95 establishes a duty, it is a duty owed by the employer not the government. We disagree.

Plaintiffs allege that a duty is imposed by N.C. Gen. Stat. section 95-4. This statute states that the Commissioner of Labor is *"charged with the duty"*:

> (4) To secure the enforcement of all laws relating to the inspection of factories, mercantile establishments, mills, workshops, public eating places and commercial institutions in the State. . . .

> (5) To visit and inspect, personally or through his assistants and factory inspectors, at reasonable hours, as often as practicable, the factories, mercantile establishments, mills, workshops, public eating places, and commercial institutions in the State, where goods, wares, or merchandise are manufactured, purchased, or sold, at wholesale or retail.
>
> (6) To enforce the provisions of this section and to prosecute all violations of laws relating to the inspection of factories, mercantile establishments, mills, workshops, public eating houses, and commercial institutions in this State before any court of competent jurisdiction. . . .

N.C. Gen.Stat. § 95-4 (1993) (emphasis added).

This statute clearly imposes specific duties upon the Commissioner of Labor to enforce inspection laws, to inspect the workplaces of North Carolina and to prosecute violations. One obvious purpose of this statute is to provide for the safety of the people who work in commercial establishments and to protect them from injuries in the workplace arising from unsafe conditions. Therefore, we hold that a violation of these duties to inspect and enforce can give rise to an action for negligence. *See Hunt v. North Carolina Department of Labor*, 125 N.C.App. 293, 480 S.E.2d 413; *see also Coleman v. Cooper*, 89 N.C. App. 188, 195-97, 366 S.E.2d 2, 7-8 (1988).

In the present case, plaintiffs have alleged that defendants have never inspected the plant. They further allege that, as a result of this breach of defendants' duty to inspect, they suffered injury. We hold that these allegations are sufficient to enable plaintiffs' negligence claim to withstand a motion to dismiss. Accordingly, the Industrial Commission did not err in denying defendants' motions.

Affirmed.

WALKER and MARK D. MARTIN, JJ., concur.

IN THE SUPREME COURT
STATE OF NORTH CAROLINA

No. 81PA97

STONE

v.

N.C. DEPT. OF LABOR

PETITION TO REHEAR

Petition by plaintiffs to rehear pursuant to Rule 31 denied 2 April 1998.

NORTH CAROLINA INDUSTRIAL COMMISSION

I.C. No. TA-12795 Through TA-13076

and

I.C. No. TA-13507 Through TA-13509

and

I.C. No. TA-13521 & TA-13542

MULTIPLE CLAIMANTS,
Plaintiffs,

-v-

NORTH CAROLINA DEPARTMENT OF LABOR,
and NORTH CAROLINA DEPARTMENT OF LABOR,
DIVISION OF OCCUPATIONAL SAFETY AND HEALTH,
Defendants.

ORDER FOR THE FULL COMMISSION

BY THOMAS J. BOLCH
COMMISSIONER

FILED: Dec. 19, 1995

This matter was reviewed by Full Commission on 13 November 1995 upon the appeal of defendants from an Order by Deputy Commissioner Bernard D. Alston, filed 12 June 1995, in which defendants' Motions to Dismiss for lack of personal and subject matter jurisdiction and for failing to state a claim upon which relief can be granted were denied.

In the 12 June 1995 Order by Deputy Commissioner Alston, defendants' Motion to Stay Discovery was denied. Defendants renewed their Motion to Chairman J. Howard Bunn, Jr., who on 3 August 1995 filed an Order Allowing Defendants' Motion and Stayed Discovery pending appeal to the Full Commission. No appeal from Chairman Bunn's Order was filed and that issue is not at this time before the Full Commission, except for the fact that once this Order is filed, discovery is no longer stayed and may proceed.

The Full Commission has reviewed the prior order based upon the record of the proceedings before Deputy Commissioner Bernard D. Alston and the briefs and oral arguments before the Full Commission. Defendants' have not shown good ground to reverse the Order by Deputy Commissioner Bernard D. Alston.

The Full Commission finds that good cause has not been shown by defendants to support their motions. The claims filed by the plaintiffs in this matter do state recognized claims against defendants upon which relief can be granted. Therefore, the Full Commission AFFIRMS and ADOPTS the denial by Deputy Commissioner Alston of defendants' motions pursuant to Rule 12(b)(6).

Since plaintiffs have stated claims against defendants upon which relief can be granted, the Industrial Commission, pursuant to the North Carolina Tort Claims Act, has jurisdiction over the subject matter of these claims and personal jurisdiction over defendants. N.C. Gen. Stat. § 143-291 *et seq.* Therefore, the Full Commission AFFIRMS and ADOPTS the denial by Deputy Commissioner Alston of defendants' motions pursuant to Rule 12(b)(1) and Rule 12(b)(2).

On 29 December 1995 the Industrial Commission received a Notice of Appeal from the North Carolina Department of Labor in I.C. NO. TA-13542, *Jason Lamont Hunt, by and through his Guardian Ad Litem, David H. Hasty v. North Carolina Department of Labor.* Defendants in TA-13542 appeal from an Order by Deputy Commissioner John A. Hedrick, filed 22 November 1995, in which their Motion To Dismiss plaintiff's claim for lack of personal and subject matter jurisdiction and for failing to state a claim upon which relief can be granted was denied.

The issues, facts and relevant law controlling the case in TA-13542 are substantially similar if not identical to those in TA-12975 through TA-13076 and TA-13507 through TA-13509 and TA-13521. Further, the Full Commission has already heard oral arguments in the previously consolidated cases. Therefore, pursuant to Industrial Commission Rule 701(8), the Full Commission shall decide the appeal in TA-13542 based solely on the record.

Having reviewed the record, the Full Commission AFFIRMS and ADOPTS the ORDER denying defendants' Motion to Dismiss, filed by Deputy Commissioner Hedrick on 22 November 1995.

Additionally, the Full Commisssion ORDERS that I.C. NO. TA-13542 is hereby CONSOLIDATED with the previously joined cases in *Multiple Claimants v. North Carolina Department of Labor* (TA-12975 through TA-13076 and TA-13507 through TA-13509 and TA-13521) for future actions before the Industrial Commission.

Defendants shall pay the costs due this Commission.

/s/ Thomas J. Bolch
THOMAS J. BOLCH
Commissioner

CONCURRING:

/s/ Laura Kranifeld Mavretic
LAURA KRANIFELD MAVRETIC
Commissioner

/s/ Coy M. Vance
COY M. VANCE
Commissioner

NORTH CAROLINA INDUSTRIAL COMISSION

I.C. #TA-12975 through TA-13076

and

I.C. #TA-13507 through TA-13509

and

TA-13521

MULTIPLE CLAIMANTS,
Plaintiffs,

v.

NORTH CAROLINA DEPARTMENT OF LABOR,
and NORTH CAROLINA DEPARTMENT OF LABOR,
DIVISION OF OCCUPATIONAL SAFETY AND HEALTH,
Defendants.

ORDER

BY D. BERNARD ALSTON
DEPUTY COMISSIONER

FILED: June 12, 1995

This matter is presently before the undersigned upon defendants' Motions to Dismiss Claim and Motions to Stay Discovery, said motions being served upon plaintiffs on November 30, 1993 in TA-12975 through TA-13076, and identical motions were served upon plaintiffs on November 21, 1994 in TA-13507 through TA-13509 and

TA-13521. Defendants have submitted Memoranda of Law in support of each motion, and plaintiffs have responded by opposing each motion and submitting Memoranda of Law in support of their opposition. By agreement of counsel for all parties, these claims are consolidated for decision upon said motions.

A hearing was scheduled and conducted before the undersigned in Rockingham, North Carolina on April 27, 1995 at which time, counsel for parties presented oral argument in support of their respective positions. The motions are now ready for decision.

The undersigned, having reviewed the Memoranda of Law submitted by the parties, and having heard oral argument from each party, hereby finds that good cause has not been shown by the defendants in support of their motions. The claims filed by the plaintiffs in this matter do state recognized claims against the defendants upon which relief can be granted, and therefore, defendants' Rule 12 (b)(6) motions are DENIED.

Since plaintiffs have stated claims against defendants upon which relief can be granted, the Industrial Commission, pursuant to the North Carolina Tort Claims Act, has jurisdiction over the subject matter of these claims and personal jurisdiction over the defendants. N.C. Gen. Stat. § 143-291 *et seq.* Therefore, defendants' Rule 12(b)(1) and 12(b)(2) motions are DENIED.

In the discretion of the undersigned, defendants' Motions to Stay Discovery are also DENIED. Accordingly, the parties are ORDERED to present an agreed upon discovery schedule within twenty (20) days of the filing of this ORDER.

No costs are assessed at this time.

/s/ D. Bernard Alston
D. BERNARD ALSTON
Deputy Commissioner